MOTION FILED

JAN 22 1996

No. 95-974

In The
Supreme Court Of The United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH
AND ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA;
MARIA-KELLEY F. YNIGUEZ; JAIME
GUITIERREZ; AND ARIZONANS
AGAINST CONSTITUTIONAL TAMPERING,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF *AMICUS CURIAE* OF U.S. ENGLISH, INC., IN SUPPORT OF PETITIONER

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January 22, 1996

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MOTION FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITION FOR CERTIORARI

COMES NOW U.S. English Inc. ("U.S. English"), by counsel, pursuant to Supreme Court Rule 37, and moves this Court for leave to file a brief *amicus curiae* in support of the Petition for Certiorari filed by Arizonans for Official English on December 20, 1995. In support of this motion, U.S. English states as follows:

1. U.S. English has approximately 600,000 members nationwide, and worked to obtain enactment of Article XXVIII of the Arizona Constitution (the "Amendment") at issue here.

2. U.S. English filed briefs *amicus curiae* in the Court of Appeals in this case.

3. U.S. English is currently promoting similar provisions in numerous other jurisdictions, including H.R. 123 in the U.S. Congress.

4. A threshold issue in any case involving the First Amendment is the scope of the court's power of constitutional adjudication.

2. Petitioner's brief discusses briefly the principle of constitutional adjudication that the Arizona constitutional provision in issue must be given all reasonable constructions in order to save it from facial invalidation. The *amicus brief* submitted by U.S. English discusses this principle in greater detail, especially as applied to the Constitutional provision here, which was enacted by referendum.

3. The amicus curiae brief submitted herewith also discusses in greater detail the authoritative construction of the Arizona Constitutional Amendment in issue, and the error of the majority opinion below in ignoring this construction. A copy of the formal Opinion of the Attorney General is printed with our brief. We understand that the Arizona Attorney General

does not intend to file a brief respecting the Petition, so it is particularly important that the Court have available a discussion and copy of the Opinion of the Attorney General and his formal position before the Court of Appeals.

3. Barnaby W. Zall, Esq., counsel for Petitioner Arizonans for Official English, does not consent to this motion.

4. All other parties consent to this motion.

WHEREFORE, it is requested that the Court issue an order granting U.S. English leave to file the attached *amicus curiae* brief in support of the Petition for Certiorari.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE U. S. ENGLISH, INC. IN SUPPORT OF PETITIONER

I. STATEMENT OF INTEREST OF AMICUS CURIAE

U.S. English is a national nonprofit organization with over 600,000 members. Its purpose is to promote legislation and programs to establish English as the official language of governments.

U.S. English has a substantial interest in this litigation because it involves the constitutionality of Article XXVIII of the Arizona Constitution, entitled "English as the Official Language" (the "Amendment"). U.S. English assisted in the initiative which resulted in the Amendment, filed briefs in the Court of Appeals below, and is currently promoting official English statutes in Congress and other states.

Any meaningful official English statute must necessarily employ broad language and rely heavily on administrative interpretations and implementations by attorneys general or other administrative officials. The lower courts' refusal to give effect to the Amendment's construction by the Arizona Attorney General, and their facial invalidation of the Amendment, will make it extraordinarily difficult to fashion similar legislation in other jurisdictions if the opinion below is allowed to stand.

U.S. English respectfully submits that Judge Reinhardt's majority opinion below is in direct conflict with prior decisions of this Court which held that facial invalidation is not appropriate, where, as here, the challenged provision has a broad range of plainly legitimate applications. The lower courts should have adopted the careful opinion of the Arizona Attorney General which narrows the scope and impact of the Amendment and cures all constitutional concerns. In the alternative, the lower courts should have certified the case to the Arizona Supreme Court for an authoritative construction of the Amendment before ruling on its constitutionality. We suggest that the Arizona

Atttorney General be invited to file a brief before the Petition for Certiorari is acted upon.

II. ARGUMENT

A. The Opinions of the Lower Courts Are In Conflict With Decisions of This Court Proscribing Facial Invalidation

The opinion below erred in ruling that the entire Amendment was facially invalid. No application of the Amendment was saved -- even admittedly Constitutional provisions such as that requiring use of English in court opinions and similar official documents. In so holding, the majority opinion below conflicts with numerous Supreme Court opinions, which have consistently held that in a case such as this one, where the challenged statute has a broad range of legitimate applications, the more appropriate remedy is to restrict the scope of the statute to cure any constitutional infirmities.

Facial invalidation of a statute challenged on constitutional grounds is "the exception" and "has been employed by the Court sparingly and only as a last resort." *Broadrick v. State of Oklahoma*, 413 U.S. 601, 613, 615 (1973). Courts must exercise caution and restraint in considering a facial challenge so as to avoid "unnecessary interference" with a state's policy choices. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Facial invalidation is only proper where the threat of unconstitutionality is both *real* and *substantial* when compared to the statute's legitimate sweep. *Broadrick*, 413 U.S. at 615. Only if the "overbreadth of the . . . statute, in relation to its legitimate reach, is substantial" will it "warrant a declaration of facial invalidity". *Brockett v. Spokane*, 472 U.S. 491, 503 fn. 12 (1985). The Court is reluctant to invalidate a statute in its entirety when the challenged law has at least some legitimate application. *See Broadrick*, 413 U.S. at 616-17. In these circumstances, the more appropriate remedy is partial invalidation. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (invalidating state trespass law, but only insofar as it applied to the distribution of literature on the streets of a company town). *See also Brockett*, 472 U.S. at 502-3 (listing First Amendment cases where statute was held invalid only as applied to particular persons or circumstances).

Moreover, the Court will not entertain a facial challenge when a narrower remedy will fully protect the litigants. In *U.S. v. National Treasury Employees Union*, __ U.S. __, 115 S.Ct. 1003 (1995), a class of plaintiffs composed of all Executive Branch employees below GS-16 challenged the constitutionality of a statute that placed a ban on federal employees receiving honoraria for speeches. *Id.* at 1010. The lower courts held that the statute violated the First Amendment and issued an injunction against enforcement of the statute against *any* executive branch employee. *Id.* at 1011-12. This Court agreed that the statute was invalid as applied to the plaintiff class; however, the Court reversed the judgment of the lower court in so far as it purported to invalidate the statute as applied to the *entire* executive branch. *Id.* at 1018-19. The Court reasoned that "although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." (internal citations omitted) *Id.* at 1018. The Court noted that the activities and status of non-parties might be quite different from those of the plaintiff class. *Id.* at 1019.

The declaratory judgment issued below is manifestly overbroad under the standards set forth in *Broadrick* and *National Treasury Employees Union*. Facial invalidation is not appropriate, where, as here, the challenged statute has a wide range of legitimate applications. For example, there is no question that the Arizona Amendment is constitutional in requiring all official

government documents to be prepared in English, and requiring all court and administrative hearings to be conducted in English or with English translation.

The fact that the Amendment employs broad language is not sufficient to strike it down *in toto*. Indeed, constitutional provisions -- including the federal First and Fourteenth Amendments -- are necessarily broad and require interpretation by courts and state officials to define their scope and application. The courts should not assume that Arizona officials will implement the Amendment in ways which will conflict with the federal Constitution or federal law, particularly where, as here, the State's Attorney General has issued a lengthy opinion narrowly interpreting the Amendment and repeatedly stating that the Amendment must be read so as not to conflict with the federal Constitution, federal laws, or other State Constitutional provisions. *See* Opinion of Arizona Attorney General ("O.A.G.") I89-099 reprinted as Appendix A, *infra*, at A-1 , A-3, A-4, A-7, A-8 thru A-10, A-12.

Facial invalidation is not necessary to protect the litigants in this case. The present action was instituted by two individual plaintiffs. At the time the lawsuit was filed, plaintiff Yniguez was employed by the Risk Management Division of the Arizona Department of Administration, where she handled malpractice claims asserted against the State. Yniguez alleged that the Amendment prevented her from speaking Spanish to Spanish speaking claimants. Similarly, plaintiff Guitterez, a state senator, claimed that the Amendment prevented him from speaking Spanish to his Spanish-speaking constituents. Even assuming the Amendment prohibited the speech of Yniguez and Guitterez and others similarly situated, the court could have protected the party plaintiffs by fashioning a far narrower remedy. Indeed, the Arizona Attorney General filed an opinion with the district court interpreting the Amendment to apply only to "official" acts or government functions. *See* O.A.G. I89-099, Appendix A,

infra, at A-2. Adoption of the Attorney General's opinion would have saved the Amendment from total invalidation while fully protecting the party plaintiffs.[2]

The Court's decisions narrowly restricting facial invalidation are not simply procedural, but rather constitute a fundamental principle necessary for the proper balancing of powers in a representative democracy, including the relationship of judicial and legislative powers. The majority opinion below egregiously disrupts that balance, by substituting the views of several judges regarding the official language of state government, in place of a state constitutional provision, approved by a majority of Arizona voters and carefully implemented by an opinion of the elected State Attorney General. The majority opinion below affects millions of Arizona citizens and their relation to their government, and warrants review by this Court.

B. The Lower Courts Disregarded This Court's Decisions in Refusing To Adopt The Narrowing Construction Proffered By The Arizona Attorney General

Shortly after the Official English Amendment was approved by Arizona voters, the Arizona Attorney General issued a lengthy official opinion interpreting its provisions. O.A.G. I89-099, Appendix A, *infra*. This opinion provided a construction that "is compatible with the United States Constitution and federal laws." *Id.* at A-1. It concluded that the Amendment "requires that official acts of Government be expressed in English", but does not "prohibit the use of other languages where they are reasonably required in the day to day operation of Government." *Id.* at A-2. In its briefs in the courts below, the Arizona Attorney General repeatedly confirmed that O.A.G. I89-009 is "the official position of the State of Arizona on the

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[2] The lower courts failure to adopt the Attorney General's opinion is discussed *infra*, at pp. 5-9.

proper interpretation" of the Amendment.[3] He reiterated that the Amendment appl[ies] only to 'official' acts" and "official government functions or actions," but not to "[r]outine conversations, instructions and communications with agencies or citizens."[4] The Attorney General's opinion is reasonable and should have been applied by the lower courts to save the Amendment from facial invalidation.

This Court has repeatedly stated that a statute that is "readily susceptible" to a narrowing construction is not subject to facial invalidation. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Erznoznik*, 422 U.S. at 216 (1975). In judging the constitutionality of a state law, the Court has regularly relied upon interpretations of the challenged statute by state officials and/or agencies -- some far less authoritative than those of the Arizona Attorney General here. *See, e.g., Frisby*, 487 U.S. at 483 (construing picketing ordinance narrowly to save its constitutionality and stating that "This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the 'picketing' proscribed by the ordinance"); *see also Broadrick*, 413 U.S. at 617-18 (referring to State Personnel Boards' interpretation of the statute in question and stating, "Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute"); *Bellotti v. Baird*, 428 U.S. 132, 143 (1976) ("the interpretation placed on the statute by appellants in this Court is of some importance and merits attention because they are the officials charged with the enforcement of the statute"); *Law Students Research Council v. Wadword*, 401 U.S. 154, 162 (1971) (accepting the interpretation of state enforcement officials despite

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[3] Br. of State of Arizona, 9th Cir. No. 93-15719, p. 3, fn. 1; see Br. of State of Arizona on Rehearing en Banc, 9th Cir. No. 93-15719.

[4] Br. of Attorney General on Rehearing en Banc, adopting Br. on Rehearing of U.S. English, p. 4.

the "language of the Rule [which] lends itself to a construction that could raise substantial constitutional questions").

Prior decisions of this Court make clear that the proffered narrowing construction need not be the most natural reading of the statute. In *United States v. X-Citement Video, Inc.*, __ U.S. __, 115 S.Ct. 464, 472 (1994), the Court rejected a strict grammatical construction of statutory language, reasoning that "It is . . . incumbent upon us to read the statute to eliminate . . . [constitutional] doubts so long as such a reading is not plainly contrary to the intent of [the legislature].". In support of this canon of statutory construction, the opinion cited the analysis in *Debartolo Corp. v. Fla. Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988), which quoted *Hooper v. California*, 155 U.S. 648, 657 (1895). The latter case interpreted a California penal statute in a manner which avoided constitutional problems, stating that " 'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Debartolo*, 485 U.S. at 575. *See also Ehlert v. United States*, 402 U.S. 99, 105-106 (1971) (Army General Counsel's opinion as to meaning of draft statute accepted to save constitutionality of statute, where opinion was "plausible . . . but not the only possible [construction]").

In the instant action, the Arizona Attorney General issued an opinion construing the amendment to apply only to the "official acts" of government. This construction of the Amendment was reasonable under the standards set forth in *X-Citement, supra*. The lower courts did not even contend that this construction conflicted with the intent of the framers of the Amendment, or the general understanding of the electorate. The Attorney General's opinion is also consistent with the language of the Amendment. The Amendment (including its title) repeatedly refers to English as the "official language" of Arizona. *Webster's Third New International Dictionary*, p. 1566 (1976) defines "official" to mean "formal" and "authoritative." Thus, the

Attorney General properly ruled that the Amendment did not apply to informal conversations and writings of government employees.

The lower courts rejected the Attorney General's construction, because Sec. 3(1)(a) of the Amendment, which requires state political units to "act in English", does not contain the word "official". The *X-Citement* opinion, however, teaches that courts should not demand reiteration of words in various parts of a statute when judging its constitutionality. *X-Citement*, 115 S.Ct. at 467. Moreover, Sections 1 and 2 of the Amendment make clear that the Amendment only deals with official or formal English use. Thus, there was no need to repeat this limitation in Sections 3 or 4, which involve other details regarding when English is or is not required.

Judge Reinhardt's majority opinion is also inconsistent with the *X-Citement* rationale insofar as it insisted on a rigid grammatical construction of the Amendment. Section 3(1)(a) of the Amendment provides that political subdivisions must "act in English". The Attorney General properly determined that "act" in this context means a "decision or determination of a sovereign, a legislative council, a court of justice," relying on *Webster's Third International Dictionary*, *supra*, at 20. The Court of Appeals improperly rejected this interpretation on the ultra-literal basis that this definition was contained under the noun "act", whereas Sec. 3(1)(a) uses "act" as a verb. A similarly rigid grammatical construction was rejected by this Court in *X-Citement*, *supra*.

In sum, the Arizona Attorney General has provided a reasonable interpretation of the Amendment, which carves out its legitimate applications and cures any arguable constitutional defects. It is immaterial that the Opinion is not the most natural reading of the Amendment, or the reading that the lower courts deem to be such. The Opinion demonstrates that the Amendment is "readily susceptible" to a narrowing construction. Even

more leeway should be given to state officials in construing their own basic Constitutional provisions, especially those which are enacted by citizen referendum and which are particularly in need of administrative construction. In keeping with precedent established by this Court, the lower courts should have adopted the Attorney General's opinion to save the Amendment from facial invalidation and future constitutional attack. Accordingly, the Petition for Certiorari should be granted so this Court may establish a proper standard for recognizing the authority of state officials to interpret and implement their own state constitutional provisions.

C. As An Alternative To Adopting The Attorney General's Opinion, The Lower Courts Should Have Certified The Case To The Arizona Supreme Court For An Authoritative Construction Of The Amendment.

The Arizona Supreme Court has jurisdiction to accept certification pursuant to Ariz. Const. art. 6, § 5(6); A.R.S. § 12-1861; and Rule 27(a) of the Rules of the Arizona Supreme Court. It was a fundamental misuse of federal powers for the lower courts to fail to utilize these state certification procedures under the standards established by this Court in *Bellotti v. Baird*, 428 U.S. 132 (1976).

In *Bellotti*, plaintiffs brought an action in district court challenging the constitutionality of a Massachusetts statute governing access to abortions by minors. Specifically, the plaintiffs argued that the statute unconstitutionally established a "parental veto" over the performance of abortions on minors, even those capable of giving informed consent. The state defendants argued that the statute only established a "preference" for parental consent and that it did not establish a "parental veto" power. The lower courts rejected the state's interpretation and issued a declaratory judgment against the enforcement of the statute. On appeal, the Supreme Court vacated the declaratory judgment and

held that the lower courts erred in refusing to certify the case to the Massachusetts Supreme Court. The Court stated:

> In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by the Massachusetts courts. As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem. (internal citations omitted).

Bellotti, 428 U.S. at 146-47. *See also Virginia v. American Booksellers Association*, 484 U.S. 383 (1988) (certification is proper where unconstrued state statute is susceptible to multiple interpretations); *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 510 (1972) ("the paradigm case for abstention arises when the challenged state statute is susceptible of a 'construction by the state courts that would avoid or modify the [federal] constitutional question' "); *Harrison v. NAACP*, 360 U.S. 167, 177 (1959) ("we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem," thus, abstention is proper).

In the present case the parties have suggested varying interpretations of the Amendment. The plaintiffs below asserted, and the lower courts held, that the Amendment applies to all state employees in all circumstances in which they are required to communicate either in writing or verbally. The Arizona Attorney General, acting on behalf of the State, has promulgated a narrower interpretation under which the Amendment would apply only to "official" acts of government. At least

one Arizona state court has upheld the Amendment's constitutionality as applied to court petitions. *Robles v. Mofford*, No. 261837 (Sup. Ct. Pima County), Nov. 14, 1989.

As discussed *supra*, at pp. 5-9, the Attorney General's opinion is reasonable and does not contradict the plain meaning of the Amendment. Thus, the Amendment is susceptible to multiple interpretations, at least one of which would save it from constitutional attack and/or materially alter the constitutional question before the Court. Further, the Arizona courts have not had an adequate opportunity to construe most provisions of the Amendment.

This is the "paradigm" case for certification. We have here a fundamental state constitutional provision, enacted by a majority of Arizona voters. It was particularly improper for the lower courts to facially invalidate the Amendment without first obtaining an authoritative construction from the Arizona Supreme Court. *See Bellotti*, *supra*. Accordingly, if this Court declines to adopt the opinion of the Arizona Attorney General, at the very least, the Court should certify the case to the Arizona Supreme Court to construe the Amendment.

III. Conclusion

For the foregoing reasons, U.S. English, Inc., as *amicus curiae*, respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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APPENDIX A

The Honorable Robert B. Osdane
President of the Senate

Re: I89-009 (R88- January 24, 1989)

We have been asked a number of general and specific questions concerning the constitutionality and effect of Proposition 106 on the delivery of governmental services and on some governmental activities. We conclude that Proposition 106, which adds to the Arizona Constitution article XXVIII, entitled English as the Official Language, is constitutional and will not greatly change the way government operates presently.

It is our duty to give Proposition 106 a construction that is compatible with the United States Constitution and federal laws. *See* Ariz. Const. art. II, § 3 ("The Constitution of the United States is the supreme law of the land."); *State v. Ramos, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982); Schecter v. Killingsworth,* 93 Ariz. 273. 282, 380 P.2d 136, 142 (1963). We must also interpret this amendment to the Constitution as a whole and in harmony with the other portions of the Arizona Constitution. *State ex rel. Nelson v. Jordan,* 104 Ariz. 193. 196, 450 P.2d 383, 386 (1969); *State ex rel. Jones v. Lockhart,* 76 Ariz. 390, 398, 265 P.2d 447, 453 (1953). Guided by these principles, we conclude that the language of Proposition 106 does not prohibit the use of a language other than English to facilitate the delivery of governmental services. Additionally, Proposition 106 specifies in subsection 3(2)(b) that the "State may act in a language other than English . . . to comply with other federal laws."

Consequently, we do not conclude that Proposition 106 requires a diminution or unreasonable restriction of services or the placing of barriers to access to governmental processes for non-English speakers, because such an interpretation is not required by the text of the amendment itself and could be

inconsistent with applicable federal law and the Arizona and United States Constitutions.

Turning now to the language of the Proposition itself, it suggests that the purpose of the amendment is to require that official acts of government be expressed in English as the state's official language. It does not prohibit the use of other languages when they are reasonably required in the day-to-day operation of government.

Proposition 106 contains four sections. Section 1 states that "The English language is the *official* language of the State of Arizona," and goes on to provide that "As the *official* language of this State, the English language is the language of the ballot, the public schools and all government functions and actions." (Emphasis added.) The remainder of section 1 makes clear that this status of English as the official language applies to all branches and levels of government, to all official documents, and to all officials and employees.

Section 2 provides that "This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona." Neither section 1 nor section 2 contain any language prohibiting the use of any language other than English.

Section 3 does, however, contain terms which prohibit governmental *acts* in a language other than English. After providing for certain exceptions, subsection 3(a) states: "This State and all political subdivisions of this State shall *act* in English *and in no other language.* (Emphasis added.) Subsection 3(b) prohibits governmental entities from requiring the use of a language other than English, and 3(c) states that governmental documents must be in English to be valid and enforceable. The exceptions to the requirement that governmental entities *act* in English are (in accurate paraphrase): (a) to assist in English-as-a-second-language instruction; (b) to comply with

federal laws; (c) to teach a foreign language; (d) to protect public health or safety; and (e) to protect the rights of criminal defendants or victims of crime.

Section 4 provides for a private cause of action to enforce the article.

Most of the concerns raised in the opinion request involve the use of a language other than English in the delivery of governmental services. Therefore subsection 3(1)(a), which contains the words "shall *act* in English and in no other language," is the applicable subsection that will be primarily discussed. (Emphasis added).

If use of a language other than English is reasonably needed to provide governmental services fairly and effectively without adversely impacting an ethnic/linguistic group, the use of that language by the deliverer of governmental services is required by federal laws. The federal laws most closely relevant are Titles VI and VII of the Civil Rights Act of 1964, as interpreted by their implementing regulations and by the courts.[1]

Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, defines "program or activity" very broadly as:

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[1] Title VI; 42 U.S.C. § 2000d-7; Title VII: 42 U.S.C. § 2000e to 2000e-17; for a survey of the Title VI implementting regulations, see *Guardians Association v. Civil Service Commission of the City of New York,* 463 U.S. 582, 618-621 (1983). For the discussion of Title VII interpretations, see *infra* pp. 7, 9.

> a department, agency or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency . . . to which the assistance is extended . . . ; or . . . a public system of higher education agency . . . or other school system . . . .

If an entity receives no federal assistance, its duty to provide services (if fairness and effectiveness so require) in a language other than English is, as discussed *infra* at pp. 6-8, nonetheless not precluded by Proposition 106. We reach this conclusion because of our interpretation that the English-only requirement applies only to official acts of government, and not to every act of every government official or employee. Further, a contrary conclusion would raise serious questions under the equal protection clause of the United States and Arizona Constitutions.

If a governmental entity is covered by Title VI and appropriate regulations, proof of intentional discrimination (including discrimination based on ethnicity) is not necessary to prove a violation of this federal law. *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983). All that is needed is a showing that the entity applies a rule, even if fair on its face, which has an adverse impact on an ethnic minority, and is not justified by a business necessity.[2]

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[2] This result follows from the language and construction of Title VI and its implementing regulations. At least forty federal agencies have adopted regulations implementing Title VI and applying the disparate impact standard. *See Guardians*, 463 U.S. at 619, and nn.6-7. Funding provided by these agencies affects a very broad range of governmental services. *See also Alexander v. Choate*, 469 U.S. 287 (1985) (state policy having disparate impact on handicapped persons would be prohibited by regulations implementing section 504 of the Rehabilitation Act of 1973 if "meaningful access" to benefits not provided; Title VI regulations referred to as providing guidance for standard).

Linguistic groups are ethnic groups, and non-English speakers in Arizona and the United States meet the criteria of ethnic minorities.[3] If the words in subsection 3(1)(a), "act in English and in no other language" were to be construed to mean that needed governmental services could not be delivered in a language other than English no matter what the needs of fairness and effectiveness, there would be an adverse impact on non-English speakers. Such a construction would result in a violation of federal law. Moreover, the practice of delivery of services in a language other than English (where reasonably needed) would be an exception provided for by subsection 3(2)(b).[4].

Thus, if the words of section 3(1)(a), "This State . . . shall act in English and in no other language" were to be construed

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[3] *See, e.g. Yu Cong Eng. v. Trinidad*, 271 U.S. 500 (1926) (Philippine law prohibiting keeping of account books in any language other than English, Spanish or a local dialect violates equal protection and due process rights of Chinese, in spite of defense that law was needed to facilitate tax collection); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (prohibition of teaching children in any language other than English which was directed at persons of German descent violates due process cluase); *Bartels v. Iowa*, 262 U.S. 404 (1923) ("Official English" statute directed at persons of German descent violates due process).

[4] *See generally*, Note, "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States." 100 Harv. L. Rev. 1345 (1987). *See also Lau v. Nichols*, 414 U.S. 563 (1974). In *Lau*, the Court noted that "there is not equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." 414 U.S. at 566. For the application of the disparate impact standard (as opposed to requiring proof of intentional discrimination) to "English-only" rules in an employment context, see, *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988); 29 C.F.R. § 1606.7(b)-(c) (1987); E.E.O.C. Decision 83-7, 31 F.E.P. 1861 (1983). *See also Civil Rights Division of the Arizona Department of Law v. Amphitheater Unified School District*, 140 Ariz. 83, 680 P.2d 517 (App. 1983) (recognizing disparate impact analysis appropriate to establish a violation of the Arizona Civil Rights Act, and establishing "business necessity" as the proper standard of defense).

to mean "shall deliver services in English and in no other language," the subsection 3(2)(b) exception (compliance with federal laws), would almost entirely swallow up the rule. Examining the language of Proposition 106, in context, we do not believe this was what was intended. Although Proposition 106 does not define "act," section 1 gives some guidance, providing, in pertinent part, as follows:

(2) As the official language of this State, the English *language is the language of the ballot, the public schools and all government functions and actions.*

(3)(a) This Article applies to:

(i) the legislative, executive and judicial branches of government.

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities.

(iii) *all statutes, ordinances, rules, orders, programs and policies.*

(iv) all government officials and employees during the performance of government business.

(Emphasis added). Because of the broad introductory language of subsection 1(2), clearly stating that English shall be used for ballots, public schools, and "all government functions and actions," we do not perceive subsection 1(3)(a) (iii) to be an exclusive list, but rather examples of the types of official acts that are contemplated to be covered by Proposition 106.[5] We also look to the dictionary for a common meaning of the word "act." The most clearly applicable common meaning of "act"

[5] Enumeration of a list of items in a constituion generally expresses the intent to exclude items not included in the list. *Whitney v. Bolin,* 85 Ariz. 44, 47, 330 P.2d 1003, 1005 (1958). However, this principle will not be applied to contradict the apparent intent of a provision, *Forsythe v. Paschall,* 34 Ariz. 380, 383, 271 P. 865, 866 (1928).

used as a noun is "a decision or determination of a sovereign, a legislative council, or a court of justice." Webster's International Dictionary 20 (3ed., unabridged, 1976).

We therefore construe "act" in this context to mean an official act of the government.

Such a construction may also be necessary to avoid conflict with the equal protection clauses of the fourteenth amendment to the federal constitution and article II, section 13 of the Arizona Constitution.[6] Classifications based on ethnicity will be closely scrutinized, and will violate the equal protection clause unless the government can justify them by establishing a compelling interest, *Hernandez v. Texas,* 347 U.S. 475 (1954); *Graham v. Richardson,* 403 U.S. 365 (1971) (alienage). Classifications based on language are not in themselves considered, for equal protection purposes, to be invidiously discriminatory classifications based on ethnicity. *Soveral-Perez v. Heckler,* 717 F.2d 36 (2d Cir. 1983); *Frontera v. Sindell,* 522 F.2d 1215 (6th Cir. 1975); *Carmona v. Sheffield,* 475 F.2d 738 (9th Cir. 1973). Where an intent to discriminate on the basis of ethnicity can be shown as a purpose of the language classification, however, an intent to discriminate invidiously may be inferred. *Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031, 1039 and n.6 (9th Cir. 1988) (approving the reasoning of Olagues v. Russoniello,* 797 F.2d 1511, 1520-21 (9th Cir. 1986) (en banc), *vacated as moot,* ____ U.S.____, 108 S.Ct. 52, 98 L. Ed. 2d 17 (1987) (language a proxy for intentional discrimination on basis of ethnicity where ethnic group thus identified

[6] Article II, section 13 provides:

No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to al citizens or corporations.

"The equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect." *Valley National Bank of Phoenix v. Glover,* 62 Arix. 538, 554, 159 P.2d 292, 299 (1945).

carries a history of mistreatment, political exclusion, and historically long-term use of language identified with ethnicity)). Discrimination based on linguistic characteristics has also been directly held to constitute intentional ethnic discrimination in an employment law (Title VII) context. *Carino v. University of Oklahoma Board of Regents,* 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Department of Public Welfare, 30 F.E.P. 387 (S.D. Ohio 1978), *aff'd*, 628 F.2d 980 (6th Cir. 1980) (per curiam).

Intentional discrimination has been inferred where actions by the majority were seen to give governmental effect to private biases. *See, e.g., Palmore v. Sidoti,* 466 U.S. 429 (1984). Intent has been inferred as least three times by the United States Supreme Court where voters approved popular referendum measures which, although facially fair, had the effect of overturning legislative enactments which legitimately served the needs of minorities. In *Reitman v. Mulkey,* the California legislature had prohibited racial discrimination in housing. By the passage of Proposition 63, the voters amended the state constitution to overturn and prevent the reenactment of those laws. The Court voided the Proposition as violative of the equal protection clause because it gave effect to private biases in attempting to take away protection already given to minorities. 387 U.S. 369 (1967). The Court followed the same principle in voiding "voter approval" and "voter initiative" measures which purported to reverse anti-discrimination laws enacted by a legislative body. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School District No. 1,* 458 U.S. 385 (1969); *Washington v. Seattle School District No. 1,* 458 U.S. (1982).[7]

We do not interpret Proposition 106 as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to

[7] *See also Plyler v. Doe*, 457 U.S. 202, 219 (1982) (creation of ethnic "underclass" by excluding minor children of undocumented resident aliens present within the United States from public school system violates equal protection clause).

ensure fair and effective delivery of governmental services to non-English speakers. If this were required, the Proposition could be found to give governmental effect to private biases by taking away protection legitimately offered to those entitled to them, and thus would be voided as a violation, not only of Title VI, but also of the federal and state equal protection clauses.[8]

To avoid possible conflicts with the federal and state constitutions and federal laws, we therefore conclude that Proposition 106 cannot interfere with the fair and effective delivery of governmental services in languages other than English, or otherwise affect governmental operations so as to unreasonably disadvantage non-English speakers.

Consistent with this conclusion, we reiterate that the provision of Section 3(1)(a). "This state and all political subdivisions of this state shall act in English and in no other language," means that official acts of government as government shall be in English as the State's official language. It does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government. With these general conclusions in mind, we are now able to answer the specific questions presented to us.

We have been asked if any restrictions on the use of a language other than English need to be made in any of the following situations:

a. The interaction of state lottery officials with non-English speaking persons . . . either as employees or agents, or as lottery contestants?

A requirement that an employee speak only English on the job, or a requirement that all employees be able to speak English would be a violation of Title VII of the Civil Rights Act of 1964 unless those requirements are bona fide occupational qualifications reasonably necessary to the operation of governmental

[8] *See also* cases cited in n.3, *supra*.

business. *Guitierrez v. Municipal Court of Southeast Judicial District,* 838 F.2d 1031 (9th Cir. 1988). A state "Official English" law cannot be used to establish a bona fide occupational qualification. *Id.* at 1044. The ability to speak English could be a bona fide occupational qualification for an employee if regular contact with the English-speaking public is part of the job requirements, or if an employee would be required, for instance, to interpret official English documents or transmit directions delivered in English. If it is not "reasonably necessary" for all employees of the state lottery to be English proficient in order to perform certain jobs for the lottery, it would be permissible for supervisors to communicate with employees who do not speak English in, or through, another language. Lottery contestants who do not speak English may be communicated with in a language other than English in the day-to-day delivery of services, on the general principles discussed above.

b. The printing of motor vehicle division pamphlets or oral explanation of licensing procedures to applicants for driver and vehicle licensing in languages other than English?

The provision of non-English assistance, whether written or oral, is permissible, and is required if it is necessary to reasonably provide fair and effective services. The nature and extent of the requirement depends on what is both reasonable and necessary for the purpose. *See, e.g, Lau v. Nichols,* 414 U.S. 563 (1974). What is required also depends on whether or not there are any applicable federal regulations. Moreover, the exemption set out in subsection 3(2)(d) permits use of a language other than English "to protect public health or safety."

c. The naming or designation of highways, streets, bridges, or towns in languages other than English?

The name itself is not an act of government, as we have interpreted the word "act." We perceive a distinction between the use of a word for purposes of identification and the use of

language for the purpose of communication of ideas. Further, we recognize that words from other languages historically have been and continue to be absorbed into and become a part of the English language. What Proposition 106 requires is that the governmental acts which create and perpetuate the name be articulated in English. It does not prohibit the use of a non-English name as a street name.

d. The handling of customer inquiries or complaints involving state or local government services, such as ADOT relocation services, child support enforcement, or city water billings, in languages other than English. Is general communication between elected officials and all other governmental employees with the public at large permissible in other than . . . English?

All official documents that are governmental acts must be in English, but translation services and accommodating communications are permissible, and may be required if reasonably necessary to the fair and effective delivery of services, or required by specific federal regulation. Communications between elected and other governmental employees with the public at large may be in a language other than English on the same principles.

In addition, an elected official may have a federal first amendment right to communicate with constituents in the language of choice. *See Garrison v. State of Louisiana,* 379 U.S. 64 (1964) (elected official has first amendment protection for statements made in the conduct of his office); *Reeves v. McConn,* 631 F.2d 377 (5th Cir. 1980) (first amendment right of expression includes rights to communicate by most effective means).

e. Discussing professional or business licensing requirements, or accepting license applications, in languages other than English?

Discussions may be in a language other than English, and interpretation services may be provided, but the official application acted upon and the official license issued must be in English.

f. Providing information on state parks services or programs in languages other than English?

On the same principles, such translations, and direct provision of services in languages other than English are permissible. Since the state parks provide services to visitors from around the world, this question represents a good example of why "shall act" in the Proposition must mean "shall act officially as the government" and not "shall provide services." Moreover, the exemption of subsection 3(2)(d) would permit use of a language other than English if deemed necessary for health and safety reasons in the discretion of those responsible for the parks.

g. Providing information on services or programs offered at common schools or universities in languages other than English?

Again, providing such services and information is permissible and may be required. In particular, educational institutions subject to Title VI should refer to the federal regulations applicable to their agency.

h. The practice of the Governor, employees of the Commerce Department, and other state or local officials or employees visiting with non-English speaking foreign government officials or business representatives of foreign corporations to conduct trade missions and related promotional activities on behalf of Arizona?

Such discussions are permissible, as are translations of any official documents which may result, but the official documents as they are to be acted upon by governments in Arizona must be in English.

i. [W]ith respect to each of the above questions . . . would the answers given change if the non-English speaking persons involved are native Americans?

Our answers would be not be different because the persons involved are native Americans.

In summary, we conclude that Proposition 106 requires official acts of government to be in English. It does not prohibit the use of languages other than English that are reasonably necessary to facilitate the day-to-day operation of government. Proposition 106, therefore, is constitutional, under both the Arizona and United States Constitutions, and compatible with applicable federal law.